SUPREME COURT, U.S.

FILED

DEC 6 1973

MICHAEL RODAK, JR., CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. ——— 73-885

LEROY LUNA,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

DON HAMILTON
800 Cravens Building
119 North Robinson
Oklahoma City, Oklahoma 73102
232-8185 (405)

Counsel for Petitioner, LeRoy Luna

December, 1973

UTTERBACK TYPESETTING CO., 819 W. CALIF., OKLAHOMA CITY, PH. 235-0080

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In the
Supreme Court of the United States
OCTOBER TERM, 1973

No. ———

LEROY LUNA,
Petitioner,

VERSUS

THE STATE OF OKLAHOMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

COMES NOW LeRoy Luna, and petitions this Court for a Writ of Certiorari to review the final judgment of the highest court hearing criminal cases in the State of Oklahoma, to-wit: The Oklahoma Court of Criminal Appeals, and for cause alleges and states:

I. REPORTED OPINIONS

That the only reported opinion involving this case is reported officially at 513 P.2d 1399, and unofficially at 44 Oklahoma Bar Association Journal 2397.

2. JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was both dated and entered September 7, 1973, therefore, under Rule 22(1), Revised Rules of the Supreme Court of the United States, this Petition is timely filed inasmuch as pursuant to Rule 4.6 of the Rules of the Court of Criminal Appeals of the State of Oklahoma, no Petition for Rehearing will be considered. Rule 4.6 states:

> "Once the Court of Criminal Appeals renders its decision on an appeal submitted under the provisions of part four (post conviction relief) of these Rules, a Petition for Rehearing will not be considered."

The statutory provision believed to confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari is 28 U.S.C. §1257(3).

3. QUESTIONS FOR REVIEW

The questions presented for review herein are:

(a) Whether Petitioner was unconstitutionally deprived of his right to counsel prior to entering a plea of guilty to a felony charge; and

(b) Whether Petitioner involuntarily pleaded guilty to a felony.

4. CONSTITUTIONAL AND STATUTORY PROVISIONS

The Federal constitutional provisions involved in the case herein include:

"AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

"AMENDMENT VI—JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

"AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

"Section 1. * * * nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The statutes of the State of Oklahoma which this case involves include:

22 O.S.A.:

"§251. Magistrate must inform defendant of charge and rights

"When the defendant is brought before a magistrate upon an arrest, either with or without a warrant, on a charge of having committed a public offense, the magistrate must immediately inform him of the charge against him, and of his right to the aid of counsel in every stage of the proceedings, and also of his right to waive an examination before any further proceedings are had."

"§252. Defendant allowed counsel—Messages to counsel—Change of venue

"He must also allow to the defendant a reasonable time to send for counsel, and adjourn the examination for that purpose; and must, upon the request of the defendant, require a peace officer to take a message to such counsel in the county or city as the defendant may name. The officer must, without delay, perform that duty, and shall receive fees therefor as upon a service of a subpoena: Provided, However, that at any time before the examination is begun, a change of venue may be had, for the same causes and in the same manner, and be transmitted to another justice, as in cases finally triable before a justice of the peace."

"§258. Preliminary examinations and proceedings thereon

"First: The witnesses must be examined in the presence of the defendant, and may be cross-examined by him. On the request of the county attorney, or the defendant, all the testimony must be reduced to writing in the form of questions and answers and signed by the witnesses, or the same may be taken in shorthand

and transcribed without signing, and in both cases filed with the clerk of the district court, by the examining magistrate, and may be used as provided in 22 O.S. 1951 §333. In no case shall the county be liable for the expense in reducing such testimony to writing, unless ordered by the judge of a court of record."

"§1076. Notice to defendant of his right to appeal—Stay of execution of judgment

"The court shall at the time of entering judgment and sentence notify the defendant of his right to appeal. An appeal from a judgment of conviction stays the execution of the judgment in all cases where sentence of death is imposed, but does not stay the execution of the judgment in any other case unless the trial or appellate court shall so order."

21 O.S.A.

"§851. Desertion of children under age of ten—Penalty

"Any parent of any child or children under the age of ten years, and every person to whom such child or children have been confided for nurture or education, who deserts such child or children within the State of Oklahoma, or takes such child or children without the State of Oklahoma, with the intent wholly to abandon it, shall be deemed guilty of a felony and upon conviction thereof shall be punished by imprisonment in the State penitentiary for any period of time not less than one year or more than ten years."

5. STATEMENT OF THE CASE

On the 24th day of June, 1954, information by complaint was filed by Frankie Marie Luna before W. G. Beazley, Justice of the Peace of Holdenville, Oklahoma, District No. 1, in Case No. 9352, alleging child abandonment. That same day, a warrant of arrest was issued for the Petitioner,

LeRoy Luna, hereinafter referred to as "Luna," by Justice of the Peace W. G. Beasley. The warrant of arrest was returned August 24, 1954, alleging receipt of said warrant June 8, 1954, and the execution thereof August 24, 1954. On August 24, 1954, Luna was brought before W. G. Beasley, Justice of the Peace, for arraignment and allegedly waived preliminary hearing at said time.

On August 25, 1954, Information was filed in the District Court in and for Hughes County, State of Oklahoma, Case No. 2826, against Luna, alleging child abandonment, a felony in Oklahoma, and on August 27, 1954, Luna allegedly pleaded guilty before District Judge Bob Howell, and was sentenced to five years imprisonment, said sentence being suspended pending the good behavior of the Petitioner.

The only record of the proceeding in which Defendant allegedly pleaded guilty and was sentenced to five years imprisonment, said sentence being suspended on good behavior, is a Court minute entered August 27, 1954, which recited the following:

> "Defendant appeared in person in open court. Was duly informed of his constitutional rights. Waived time to plead; waived reading of Information and entered a plea of guilty. Upon the recommendation of Assistant County Attorney, John R. Turner, Defendant sentenced to serve five years in the state penitentiary at McAlester, Oklahoma. It is the judgment and sentence of the Court that said defendant serve five years in the State Penitentiary at McAlester, Oklahoma, said sentence to be suspended on good behavior."

It is undisputed that Defendant did not have counsel. There is no affirmative evidence to the effect that Defendant waived his right to have counsel present, or that he freely and voluntarily entered a plea of guilty.

That sentence has been completely executed. On March 7, 1973, Petitioner filed an Application for Post Conviction Relief in the District Court in and for Hughes County, Oklahoma, attacking the validity of the plea of guilty, and the Judgment and Sentence rendered thereon. An evidentiary hearing was then ordered, and on May 3, 1973, the District Court in and for Hughes County, State of Oklahoma, entered an Order denying post conviction relief. From that Order, Petitioner lodged an appeal in the highest court hearing criminal appeals in the State of Oklahoma, the Court of Criminal Appeals of the State of Oklahoma. That Court affirmed the decision of the trial court on September 7, 1973, and Petitioner seeks a Writ of Certiorari to review the decision of the Court of Criminal Appeals of the State of Oklahoma, entered September 7, 1973.

6. WHEN AND HOW FEDERAL QUESTIONS RAISED

The Federal questions being presented herein were first raised in Petitioner's Application for Post Conviction Relief filed in the District Court in and for Hughes County, State of Oklahoma, March 7, 1973, which said Application specifically alleged that Petitioner had been denied due process of law in that he was not represented by counsel at the August 27, 1954 proceeding, that he did not receive advice as to his constitutional rights, and entered an involuntary plea of guilty, all in violation of his Federal constitutional rights under the V and VI Amendments. (Appli-

cation for Post Conviction Relief, Paragraphs V & VI, Appendix B.)

The District Court of Hughes County denied said Application for Post Conviction Relief and concluded that the Defendant was properly informed of all necessary constitutional rights at his appearance in District Court; that he effectively waived any and all rights, including any defects in procedure, and entered an effective plea of guilty and was properly sentenced thereon.

The same arguments based on deprivation of Federal consitutional rights were made in the appeal in the Court of Criminal Appeals of the State of Oklahoma (Petition in Error of LeRoy Luna, and Brief of Appellant).

7. ARGUMENT

Petitioner asserts that a Writ of Certiorari should be allowed in this matter for the reason that he was denied due process and equal protection of the laws, and further, deprived of his right to counsel in the proceedings held in 1954.

(a) There is never to be found in the record an affirmative statement to the effect that Petitioner waived his right to counsel, and freely and voluntarily entered a plea of guilty to the charge of child abandonment. Further, the Judgment and Sentence shows affirmatively that Petitioner was without counsel at the 1954 proceedings. This Court, in *Boykin* v. *Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 275 (1969), held that it is error for a trial judge to accept a plea of guilty without an affirmative showing that the plea was intelligent and voluntary. Further, any waiver of

one's constitutional rights cannot be presumed from a silent record, *Boykin* v. *Alabama, supra.*

It cannot be determined on the basis of the record whether the purported plea of guilty satisfied the constitutional requirements for acceptance of such a plea. This Court held in *North Carolina* v. *Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162:

> "The standard was and remains whether the plea represents a voluntary and intelligent voice among the alternative courses of action open to the Defendant." (Citing *Boykin, supra*, and others.)

Based on the record in the case at bar, it is impossible to determine whether the plea does represent such a voluntary and intelligent choice.

It is also impossible to determine on the face of the record whether Petitioner freely and voluntarily waived his fundamental rights to counsel in the 1954 proceeding, *Boykin* v. *Alabama, supra*, and was thereby able to enter a plea on the basis of sound counsel and advice. See also, dissenting opinion of Brett, J., in *Luna* v. *State*, Appendix F.

It is, therefore, urged that certiorari be granted to review the determination of the Oklahoma Court of Criminal Appeals, for the reasons that the proceedings held in 1954 were improper, Petitioner was substantially deprived of Federal constitutional rights, and the determinations

made by the District Court of Hughes County, State of Oklahoma, and the Court of Criminal Appeals of the State of Oklahoma, were erroneous.

Respectfully submitted,

DON HAMILTON
800 Cravens Building
119 North Robinson
Oklahoma City, Oklahoma 73102
232-8185 (405)

Counsel for Petitioner, LeRoy Luna

December, 1973

APPENDIX A

1955 JUDGMENT AND SENTENCE ON PL. OF GUILTY.

STATE OF OKLAHOMA, Hughes County } ss IN DISTRICT COURT

BE IT REMEMBERED, That on the 27th day of August, A. D. 19 54 the same being one of the days of the July 19 54 term of the District Court of Hughes County, State of Oklahoma, there being present the

Honorable Bob Howell Judge
Emit Peters Sheriff
Ann McPhail Clerk

And Public Proclamation of the opening of said Court having been made, the following among other proceedings were had:

THE STATE OF OKLAHOMA
vs.
LeRoy Luna
Defendant

No. 2826

FILED
AUG 27 1954
ANN McPHAIL, COURT CLERK
By [illegible] (Asst.)

The prisoner, the above named LeRoy Luna defendant, being personally present in open Court and having been legally (A) Presented by Information by County Attorney for the crime of Child Abandonment and arraigned, and said defendant having entered herein his plea of guilty, as charged in said Information and being asked by the Court if he had any legal cause to show why judgment and sentence should not be pronounced against him, and he giving no good reason in bar thereof;

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that the said LeRoy Luna be confined in the State Penitentiary at McAlester, in the State of Oklahoma, for the term of Five (5) years, for said crime by him committed. Said term of sentence to begin at and from the 27th day of August, A. D. 19 54 and that said defendant pay the costs of this prosecution taxed at $ [illegible], for which execution is awarded.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the said defendant be delivered by the Sheriff of Hughes County, State of Oklahoma, into the custody of the Warden of said Penitentiary at McAlester, in the State of Oklahoma, and that the warden of said Penitentiary do confine and imprison the said defendant for the term of sentence above mentioned.

I, LOIS MERCHANT, Court Clerk in and for Hughes County, Oklahoma, hereby certify that the foregoing, is a true, correct and complete copy of the instrument hereinbefore set out as appears of Record in the Court Clerk's Office of Hughes County, Oklahoma

12 day of Sept. 1973

Lois Merchant
Court Clerk

In accordance with this judgment, and that the Clerk of this Court do immediately certify, under the seal of the Court and deliver to the Sheriff aforesaid, two copies of this judgment, one of said copies to accompany the body of said defendant to the said Penitentiary, and to be delivered with at said Penitentiary, said copy to be warrant and authority for the imprisonment of said defendant in said Penitentiary, and the other copy to be the warrant and authority of said Sheriff, for the transportation and imprisonment of said defendant, as hereinbefore provided. Said last named copy to be returned to the Clerk of said Court with the proceedings of said Sheriff thereunder endorsed thereon. ALSO IT IS ORDERED to be remembered in the case of the Murder of said LeRoy Luna.

Done in Open Court on this 27th day of August, 19 54

[signature] Judge

NOTE (A) Presented by Information by the County Attorney of said County or indicted by a grand jury of said County.

I, _____ Clerk of the District Court of _____ County, State of Oklahoma, do hereby certify the above and foregoing to be a full, true, correct and complete copy of the Judgment and sentence in the case of the State of Oklahoma, vs. _____ on the same appears on record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this _____ day of _____ A. D. 19____

_____ District Clerk.

By _____

Rec. J. C. #5, Page 151

APPENDIX B

FILED
Hughes County
MAR 7 1973
LOIS MERCHANT,
Court Clerk
by Lois Merchant

IN THE DISTRICT COURT IN AND FOR HUGHES COUNTY STATE OF OKLAHOMA

THE STATE OF OKLAHOMA, Plaintiff,	)	
vs.	)	No. 2826
LeROY LUNA, Defendant.	)	

APPLICATION FOR POST CONVICTION RELIEF

COMES NOW the Defendant, LeRoy Luna, and in support of his Application for Post Conviction Relief, alleges and states:

I

That on June 24, 1954, Information by Complaint was filed by Frankie Marie Luna before W. G. Beasley, Justice of the Peace of Holdenville, District No. One, in Case No. 9352, without the endorsement of the Hughes County Attorney, alleging child abandonment. Said Information is marked "Exhibit A" and attached hereto.

II

That on June 24, 1954, a Warrant of Arrest was issued for the Defendant, LeRoy Luna, by Justice of the Peace W. G. Beasley. That said Warrant is marked "Exhibit B" and is attached hereto.

III

That said Warrant of Arrest was returned August 24, 1954, alleging receipt of said Warrant June 8, 1954 (before it was, in fact, issued), and the execution thereof August 24, 1954. Said Return is marked "Exhibit C" and attached hereto.

IV

That on August 24, 1954, Defendant was brought before W. G. Beasley, Justice of the Peace, and the Record of Proceedings is marked "Exhibit D" and attached hereto.

V

That on August 25, 1954, Information was filed in the District Court in and for Hughes County, State of Oklahoma, in Case No. 2826, against the Defendant, LeRoy Luna alleging child abandonment. Said Information is marked "Exhibit E" and attached hereto.

VI

That on August 27, 1954, the Defendant allegedly pled guilty before District Judge Bob Howell, and was sentenced to five years imprisonment with the stipulation: "Above sentence to be suspended pending the good behavior of said LeRoy Luna." Said Judgment and Sentence is marked "Exhibit F" and attached hereto.

VII

That the Defendant, LeRoy Luna, asserts the following errors in the proceedings hereof:

1. That the preliminary Complaint was not authorized by the County Attorney.

2. That the return of the Warrant of Arrest was void on its face.

3. That the proceedings before the Justice of the Peace denied the Defendant due process of law in that he was not represented by counsel. That he did not knowingly and willingly waive preliminary hearing. That he did not receive advice as to his constitutional rights.

4. That the Information filed in the District Court of Hughes County was not filed pursuant to a proper and legal preliminary examination.

5. That at the time of Judgment and Sentence, the Defendant was not represented by counsel. That the Defendant entered an involuntary plea to the charge. That the Defendant's plea was not based on sound counsel and advice. That the Defendant was not advised of his right to appeal from the Judgment and Sentence. That the purported suspension of the sentence was vague and indefinite.

6. That all of the proceedings incidental to the Judgment and Sentence complained of herein were in violation of the Fifth Amendment to the Constitution of the United States, the Sixth Amendment to the Constitution of the United States, Article 2, Section 7 of the Constitution of the State of Oklahoma, Article 2, Section 17 of the Constitution of the State of Oklahoma, Article 2, Section 19 of the Constitution of the State of Oklahoma, Article 2, Section 20 of the Constitution of the State of Oklahoma, Article 2, Section 21 of the Constitution of the State of Oklahoma, 22 O.S. §251, 22 O.S. §252, 22 O.S. §258, and 22 O.S. §1076.

7. That because of the constitutional and statutory irregularities in the procedural due process as applied in the instant case, the Court was without jurisdiction to impose a sentence herein.

8. That there exists evidence of material facts, not previously presented and heard, that require vacation

of the Judgment and Sentence in the interest of justice.

WHEREFORE, Defendant, LeRoy Luna, prays that this Court enter Orders herein granting post conviction relief and vacating, setting aside, and holding for naught the Judgment and Sentence entered herein August 27, 1954.

DON HAMILTON and PAUL McKINNEY
Attorneys for Defendant, LeRoy Luna

By s/ Don Hamilton
t/ DON HAMILTON
800 Cravens Building
119 North Robinson
Oklahoma City, Oklahoma 73102
232-8185 (405)

COUNTY OF OKLAHOMA)
) ss
STATE OF OKLAHOMA)

LeRoy Luna, of lawful age, being first duly sworn, upon his oath, deposes and states: That he is the Defendant in the above and foregoing Application; that he has read said Application, and that the statements and facts therein set forth are true and correct as he verily believes.

s/ LeRoy Luna

t/ LeRoy Luna

Subscribed and sworn to before me this 6th day of March, 1973.

s/ Linda J. Smith

Notary Public

(Seal)

My Commission Expires:
July 13, 1974

[APPENDIX]

Information By Complaint

THE STATE OF OKLAHOMA
vs.
LeRoy Luna
Defendant

Before
W. G. Beasley
Justice of the Peace
of Holdenville #1 District of said County.
No. [illegible]

In the Name and by the Authority of the State of Oklahoma:

Now comes Frankie Maria Luna and being duly sworn on oath states that LeRoy Luna

did in Hughes County, State of Oklahoma, on the 8th day of June 19 54.

and prior to making this Complaint, commit the crime of CHILD ABANDONMENT

in the manner and form as follows, to-wit:

That is to say, the said defendant, in the county and state aforesaid, and on the day and year aforesaid, then and there being, did then and there wilfully, unlawfully, wrongfully, and feloniously without justifiable or excusable cause abandon and desert his lawful and legitmate children under the age of fifteen years, to-wit: Phillip Luna, born 8-15-49; Glenda Faye, born 1-21-51; and Ronda, born 5-3-53, and did wholly fail, refuse, neglect to contribute anything to their support, said abandonment and dessertion on the part of the said defendant left the children in dire and necessitous circumstances.

I, LOIS MERCHANT, Court Clerk for Hughes County, Oklahoma, hereby certify that the foregoing, is a true, correct, and complete copy of the instrument herewith set out as appears of Record in the Court Clerk's Office of Hughes County, Oklahoma
This 12 day of Feb. 19 73
Lois Merchant Court Clerk
By Wilda Kennedy Deputy

contrary to the statutes in such cases made and provided, and against the peace and dignity of the State.

Frankie Maria Luna

Subscribed and sworn to before me this 24 day of June 19 54

W. G. Beasley
Justice of the Peace.

"Exhibit A"

WARRANT OF ARREST

STATE OF OKLAHOMA, COUNTY OF HUGHES.—ss.

STATE OF OKLAHOMA

vs.

Defendant.

BEFORE

Justice of the Peace of Holdenville District of said County.

No.

The State of Oklahoma, to any Sheriff, Constable, Marshal or Policeman, of the State of Oklahoma, Greeting:

Information on oath having been this day laid before me that

did on the day of 19

in Hughes County, in said State, commit the crime of

YOU ARE THEREFORE COMMANDED, forthwith to take said

and bring him before me at my office in Holdenville District, in said County, or in case of my absence or inability to act before the nearest and most accessible Magistrate in said County.

Given under my hand this day of 19

Justice of the Peace.

I, LOIS MERCHANT, Court Clerk for Hughes County, Oklahoma, hereby certify that the foregoing, is a true, correct, and complete copy of the instrument herewith set out as appears of Record in the Court Clerk's Office of Hughes County, Oklahoma

This 12 day of Feb. 19 73

Lois Merchant Court Clerk

By Wilda Hinds Deputy

"Exhibit B"

[APPENDIX]

No. _____

IN JUSTICE COURT

[illegible] DISTRICT

STATE OF OKLAHOMA

vs.

[illegible]

Filed [illegible] 19[illegible]

Justice of the Peace.

Received this writ this [illegible] day of [illegible] 19[illegible], and executed the same by arresting the said

[illegible]

on the [illegible] day of [illegible]

19[illegible], and bringing him before said Court, as commanded.

[illegible]

FEES:

Arrest	$	[illegible]
Attendance	$	[illegible]
Mileage 20	$	2.00
Expense	$	
Commitment	$	.50
From Jail	$	.50
TOTAL	$	[illegible]

I, LOIS MERCHANT, Court Clerk for Hughes County, Oklahoma, hereby certify that the foregoing is a true, correct, and complete copy of the instrument herewith set out as appears of Record in the Court Clerk's Office of Hughes County, Oklahoma

This 12 day of Feb 19 73

Lois Merchant Court Clerk

By Wilda Hamm Deputy

"Exhibit C"

TRANSCRIPT ON APPEAL OR CHANGE OF VENUE—J. P.

STATE OF OKLAHOMA,
County of Hughes ss.

2726

BEFORE
W. O. Bensley
Justice of the Peace
of Holdenville No. 1 District said County.

vs. No. 9352

LeRoy Luna

C. A. Holland
Attorney for Plaintiff

Attorney for Defendant

Filed ..... day of ..... 192...

Amount of Judgment . . . . . $.....
Amount of costs . . . . . $.....
Amount of attorney's fees . . . $.....
Amount received on judgment . . $.....
Balance due . . . . . $.....

I, LOIS MERCHANT, Court Clerk for Hughes County, Old Aquna, hereby certify that the foregoing is a True, correct, and complete copy of the Judgment herewith set out as appears of Record in the Court Clerk's Office of Hughes County, Oklahoma
This 12 day of Feb 1973
Lois Merchant Court Clerk
By Della Kinard Deputy

Case settled in full this ..... day of ..... 192...

Justice of the Peace

JUSTICE'S FEES	Pltf's Cost		Deft's Cost		RECORD OF PROCEEDINGS
Justice fees			4	25	On June 24 1954 Complaint was Filed in this Court signed by Frankie Mable Luna against LeRoy Luna charging him with the Crime of Child Abandonment. On August 24 1954 said defendant was arraigned before W. O. Bensley Justice of the Peace of Holdenville District Hughes County, Oklahoma. After reading the Complaint and explaining to the defendant his Statutory rights, said defendant waived preliminary hearing and pleaded guilty. In the light of the facts set in the Complaint it is the judgment, Order and Sentence of this Court that said LeRoy Luna be and he hereby is bound Over To The District Court of Hughes County Oklahoma. His Bond is set at $1000.00 which must be in furnished and LeRoy Luna is committed to the Jail of Hughes County Oklahoma to await the action of the District Court.
Docketing complaint					
Indexing Title and No.					
Summons, date and return					
No. of Sub, date and return					
No. of appearances					
No. of papers filed					
No. of oaths					
No. witnesses sworn					
No. of days attendance					
No. of Continuances					
No. of orders of court					
Approving bond					
Swearing to bond					
Transcript					
Transmitting papers					
Certificate					
Judgments					
Satisfaction					
Execution, date and return					
Order of attachment					
Venire					
Impanelling jury					
Total			4	25	
Carried forward			4	25	

W. O. Bensley
Justice of the Peace.

"Exhibit D"

—X—

[APPENDIX]

INFORMATION

STATE OF OKLAHOMA,
HUGHES COUNTY — SS:

STATE OF OKLAHOMA

Vs.

LeRoy Luna

Defendant.

DISTRICT COURT
County of Hughes, State of Okla.

FILED AUG 25 1954 P.M.
ANN MCPHAIL, COUNTY CLERK
By Audrey Wiseman Deputy

IN THE DISTRICT COURT

No. 2826

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OKLAHOMA;

Now comes C. A. Holland, the duly qualified and acting County Attorney in and for Hughes County, State of Oklahoma, and gives the District Court of Hughes County and State of Oklahoma to know and be informed that

LeRoy Luna

did, in Hughes County, and the State of Oklahoma, on or about the 8th day of June, in the Year of Our Lord, One Thousand Nine Hundred and Fifty-four, and anterior to the presentment hereof, commit the crime of

CHILD ABANDONMENT

in the manner and form as follows, to-wit:

That is to say, the said defendant, in the County and State aforesaid, on the day and year aforesaid, then and there being, did then and there wilfully, unlawfully, wrongfully and feloniously without justifiable or excusable cause abandon and desert his lawful and legimate children under the age of fifteen years, to-wit: Phillip Luna, born 8-15-49; Glenda Faye, born 1-21-51; and Donna, born 5-3-53, and did wholly fail, refuse, neglect to contribute anything to their support, said abandonment and desertion on the part of the said defendant left the children in dire and necessitous circumstances.

I, LOIS MERCHANT, Court Clerk for Hughes County, Oklahoma, hereby certify that the foregoing is a true, correct, and complete copy of the instrument herewith set out as appears on file and in the Court Clerk's Office of Hughes County, Oklahoma
This 12 day of Feb. 1973
Lois Merchant Court Clerk
By Wilda Kennedy Deputy

Contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the State.

C. A. Holland
County Attorney.

Rec. Information Doc. #3, Page 260

"Exhibit E"

1502—JUDGMENT AND SENTENCE ON PLEA OF GUILTY.

STATE OF OKLAHOMA, Hughes County } ss. IN DISTRICT COURT

BE IT REMEMBERED, That on the 27th day of August, A. D. 19 54 the same being one of the days of the July 19 54 term of the District Court of Hughes County, State of Oklahoma, there being present the

Honorable Bob Howell Judge

Kirk Peiste Sheriff

Ann McPhail Clerk

And Public Proclamation of the opening of said Court having been made, the following among other proceedings were had:

THE STATE OF OKLAHOMA
vs.
LeRoy Isma
Defendant

No. 2826

FILED
AUG 27 1954
Ann McPhail, Court Clerk
By Emma McPhail Deputy

The prisoner, the above named LeRoy Isma (Negro) defendant, being personally present in open Court and having been legally (A) Presented by Information by County Attorney for the crime of Child Abandonment and arraigned, and said defendant having entered herein his plea of guilty, as charged in said Information and being asked by the Court if he had any legal cause to show why judgment and sentence should not be pronounced against him, and he giving no good reason in bar thereof;

IT IS THEREFORE CONSIDERED, ORDERED, ADJUDGED AND DECREED by the Court that the said LeRoy Isma be confined in the State Penitentiary at Mcalester, in the State of Oklahoma, for the term of Five (5) years, for said crime by him committed. Said term of sentence to begin at and from the 27th day of August, A. D. 19 54, and that said defendant pay the costs of this prosecution taxed at $, for which execution is awarded.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the said defendant be delivered by the Sheriff of Hughes County, State of Oklahoma, into the custody of the Warden of the State Penitentiary at Mcalester, in the said Penitentiary at Mcalester, in the State of Oklahoma, and that the warden of said Penitentiary do confine and imprison the said defendant therein for the term of Five (5) years, in accordance with this judgment, and that the Clerk of this Court do immediately certify, under the seal of the Court and deliver to the Sheriff aforesaid, two copies of this judgment, one of said copies to accompany the body of said defendant to the said Penitentiary, and to be his warrant and authority for the imprisonment of said defendant in said Penitentiary, and the other copy to be the warrant and authority of said Sheriff, for the transportation and imprisonment of said defendant, as hereinbefore provided. Said last named copy to be returned to the Clerk of said Court with the proceedings of said Sheriff thereunder endorsed thereon, above sentence to be executed forthwith.

I LOIS MERCHANT, Court Clerk in and for Hughes County, Oklahoma, hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears of Record in the Court Clerk's Office of Hughes County, Oklahoma

Witness my hand and seal of said Court this 12 day of Jan 1973

Lois Merchant Court Clerk

By Deputy

Done in open Court this 27th day of August, 19 54

Bob Howell Judge

NOTE (A) Prosecuted by information by the County Attorney of said County or indicted by a grand jury of said County.

I, Court Clerk of the District Court of County, State of Oklahoma, do hereby certify the above and foregoing to be a full, true, correct and complete copy of the judgment and sentence in the case of the State of Oklahoma, vs. as the same appears on record in my office.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court, this day of A. D. 19

District Clerk

By

Title Deputy

"Exhibit F"

APPENDIX C

FILED
Hughes County
MAY 11 1973
LOIS MERCHANT, Court Clerk

IN THE DISTRICT COURT IN AND FOR HUGHES COUNTY STATE OF OKLAHOMA

THE STATE OF OKLAHOMA,

PLAINTIFF,

VS. NO. 2826

LeROY LUNA,

DEFENDANT.

ORDER DENYING POST CONVICTION RELIEF

On the 3rd day of May, 1973, comes on to be heard application for Post Conviction Relief filed herein by the defendant, LeRoy Luna. Defendant, LeRoy Luna appearing in person and with his attorney, Don Hamilton, the State of Oklahoma appearing by Assistant District Attorney of Hughes County, Paul Ballinger. The Court, after hearing all of the evidence and taking said matter under consideration and since that date having carefully considered all of the evidence, including the record on file herein together with all of the testimony by sworn witnesses and as admitted into evidence at the hearing for Post Conviction Relief, the Court finds as follows:

The record in this case shows that a complaint was filed in the Justice Court of Hughes County on June 24, 1954, charging defendant with Child Abandonment. A warrant issued, defendant arrested on said warrant, appeared before Justice of the Peace. waived preliminary hearing

and ordered held for District Court. On August 24, 1954, an Information was filed in the District Court of Hughes County. On August 27, 1954, a judgment and sentence was filed on a plea of guilty with defendant receiving a five year suspended sentence. The official minutes of the District Court show that at the appearance in District Court before Honorable Bob Howell as follows:

> "Defendant appeared in person in open Court. Was duly informed of his constitutional rights. Waived time to plead; waived reading of information and entered a plea of guilty. Upon recommendation of Assistant County Attorney, John R. Turner, defendant sentenced to serve 5 years in the State Penitentiary at McAlester, Oklahoma. It is the judgment and sentence of the Court that said defendant serve 5 years in the State Penitentiary, at McAlester, Okla., said sentence to be suspended on good behavior."

The Defendant filed his application for Post Conviction Relief setting out specific errors as follows:

1. That the preliminary Complaint was not authorized by the County Attorney.

2. That the Return of the Warrant of Arrest was void on its face.

3. That the proceedings before the Justice of the Peace denied the Defendant due process of law in that he was not represented by counsel. That he did not knowingly and willingly waive preliminary hearing. That he did not receive advice as to his constitutional rights.

4. That the Information filed in the District Court of Hughes County was not filed pursuant to a proper and legal preliminary examination.

5. That at the time of Judgment and Sentence, the Defendant was not represented by counsel. That the Defendant entered an involuntary plea to the charge. That the Defendants plea was not based on sound counsel and advice. That the Defendant was not advised of his right to appeal from the Judgment and Sentence. That the purported suspension of the sentence was vague and indefinite.

6. That all of the proceedings incidental to the Judgment and Sentence complained of herein were in violation of the Fifth Amendment to the Constitution of the United States, the Sixth Amendment to the Constitution of the United States, Article 2, Section 7 of the Constitution of the State of Oklahoma, Article 2, Section 17 of the Constitution of the State of Oklahoma, Article 2, Section 19 of the Constitution of the State of Oklahoma, Article 2, Section 20 of the Constitution of the State of Oklahoma, Article 2, Section 21 of the Constitution of the State of Oklahoma, 22 O.S. §251, 22 O.S. §252, 22 O.S. §258, and 22 O.S. §1076.

7. That because of the constitutional and statutory irregularities in the procedural due process as applied in the instant case, the Court was without jurisdiction to impose a sentence herein.

8. That there exists evidence of material facts, not previously presented and heard, that require vacation of the Judgment and Sentence in the interest of justice.

The defendant offered in the way of evidence testimony of Honorable Bob Howell, District Judge of Hughes County, the former Assistant County Attorney present at his sentencing, the present Court Clerk of the District Court, Defendant and Defendant's daughter. The Defendant attempted to introduce a letter purportedly written by the complaining witness in the original charge and his

former wife, whom it was alleged was ill and could not attend the hearing. The offer was rejected by the Court and no request was made by the defendant in reference thereto. None of the court officials testified that they had specific recollection to the particular case. The defendant testified in contradiction to most of the official records.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

From the evidence the Court finds that the Judgment and Sentence is silent on its face as to the defendant having counsel or having waived his right to same. However, the minute reflects that defendant "was duly informed of his constitutional rights." Judge Howell testified that this statement in his minutes always meant an explanation of defendant's right to a trial by jury, his right to a preliminary hearing, his right to an attorney and the fact that one would be appointed for him if he could not employ one. That he had never sentenced a defendant without explaining those rights. The defendant then affirmatively waived his time to plead and waived reading of the Information as reflected by the official minute. It is well settled law that the defendant must have counsel or knowingly and willingly waive his right to one as a fundamental constitutional right in order for a court to have authority to accept his plea and sentence him. Our court has adopted the criteria to be used in assessing the standards of a waiver in Stewart v. State, 495 P.2d 834, and specifically referring therein to Johnson v. Zerbst, 304 U.S. 458, where the Court held,

> ". . . A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. . . ."

and states further whether same is sufficient to be decided in each case on its own facts and circumstances. The Court finds as a fact that the defendant was advised of his basic constitutional rights, and those rights were fully discussed with him by the sentencing judge so that the sentencing

judge was satisfied that the defendant fully understood those rights. That by waiving his time to plead so he could enter a plea of guilty and that he knowingly and willingly waived those rights, including his right to counsel under the law.

The Court further finds that defendant was not advised of his constitutional right to appeal. However, in the absence of showing specific authority that it was the duty of the Court at that time or that such is a fundamental right so as to require retroactive application, the Court finds that this failure is not sufficient to require voiding the Judgment and Sentence. The sentence imposed has long since been served and the fact that the suspension was vague is of no serious consequence at this time.

The Court finds that no material facts were presented to the Court that had not been presented and heard in the case.

It is the conclusion of the Court that the defendant was properly informed of all the necessary constitutional rights at his appearance in District Court; that he effectively waived any and all rights, including any defects in procedure and entered an effective plea of guilty and was properly sentenced thereon. That for the reasons as set out herein the application should be and the same is in all things denied.

s/ Rudolph Hargrave

t/ RUDOLPH HARGRAVE
District Judge

APPENDIX D

FILED
Hughes County
JUN 5 - 1973
LOIS MERCHANT, Court Clerk
by Lois Merchant

FILED
In the Court of Criminal Appeals
State of Oklahoma
JUNE 4 1973
DELMAS FORD, Clerk

IN THE COURT OF CRIMINAL APPEALS,
STATE OF OKLAHOMA

LeROY LUNA, Appellant,	)	
vs.	)	No. PC-73-73
THE STATE OF OKLAHOMA, Appellee.	)	

PETITION IN ERROR

COMES NOW LeRoy Luna, Appellant herein, and applies to this Court for review of the Order entered May 11, 1973, denying post conviction relief, entered by the Honorable Rudolph Hargrave, District Judge in and for Hughes County, State of Oklahoma, and for cause alleges and states:

(1) That the form of the post conviction findings is improper and does not comply with the appropriate standards for such pleadings;

(2) That the trial Court erred in not granting the Application of the Appellant for post conviction relief;

(3) That in Hughes County District Court Case No. 2826, the subject of post conviction relief, the return of the Warrant of Arrest for LeRoy Luna was void, on its face;

(4) That the proceedings purportedly held before the Justice of the Peace denied LeRoy Luna due process of law in that he was not represented by counsel. That he did not knowingly and willingly waive preliminary hearing; and that he did not receive advice as to his constitutional rights;

(5) That the Information filed in the District Court of Hughes County Case No. 2826 was not filed pursuant to a proper and legal preliminary examination;

(6) That at the time of Judgment and Sentence in said case, LeRoy Luna was not represented by counsel. That LeRoy Luna entered an involuntary plea to the charge and that his plea was not based on counsel and advise;

(7) That LeRoy Luna was not advised of his right to appeal from the Judgment and Sentence, and that the purported suspension of the sentence was vague and indefinite;

(8) That all of the proceedings incidental to the Judgment and Sentence complained of herein were in violation of the Fifth Amendment to the Constitution of the United States; the Sixth Amendment to the Constitution of the United States; Article 2, Section 7 of the Constitution of the State of Oklahoma; Article 2, Section 17 of the Constitution of the State of Oklahoma; Article 2, Section 19 of the Constitution of the State of Oklahoma; Article 2, Section 20 of the Constitution of the State of Oklahoma; Article 2, Section 21 of the Constitution of the State of Oklahoma; 22 O.S.A. §251; 22 O.S.A. §252; 22 O.S.A. §258; and 22 O.S.A. §1076;

(9) That because of the constitutional and statutory irregularities in the procedural due process as applied in the instant case, the Court was without jurisdiction to impose a sentence herein;

(10) That the transcript of the evidentuary hearing conducted May 3, 1973, in Hughes County District Court Case No. 2826, is hereto attached, marked "Exhibit A", and made a part hereof as though fully written herein.

(11) That based upon all of the records cited herein, and the evidence introduced, the Court erred in failing to sustain Appellant's Application for Post Conviction Relief.

WHEREFORE, premises considered, Appellant prays that this Court enter Orders forthwith reviewing and vacating the Order of the District Court in and for Hughes County, State of Oklahoma, which denied Appellant's Application for Post Conviction Relief, and enter Orders herewith granting said post conviction relief to the end that justice be done.

s/ Don Hamilton

t/ DON HAMILTON
Attorney for Appellant
800 Cravens Building
119 North Robinson
Oklahoma City, Oklahoma 73102
232-8185 (405)

CERTIFICATE OF FILING

Don Hamilton hereby certifies that a true and correct copy of the above and foregoing Petition in Error was mailed to the District Court Clerk of Hughes County, State of Oklahoma, this 4th day of June, 1973, for filing in Case No. 2826.

s/ Don Hamilton

t/ DON HAMILTON

CERTIFICATE OF MAILING

Don Hamilton hereby certifies that a true and correct copy of the above and foregoing Petition in Error was mailed, with postage fully prepaid thereon, this 4th day of June, 1973, to the following:

Larry Derryberry
Attorney General
State Capitol Building
Oklahoma City, Oklahoma

George W. Oliphant
Assistant District Attorney
Hughes County Courthouse
Holdenville, Oklahoma

Hon. Rudolph Hargrave
District Judge
Hughes County Courthouse
Holdenville, Oklahoma

s/ Don Hamilton

t/ DON HAMILTON

APPENDIX E

FILED
In Court of Criminal Appeals
State of Oklahoma
SEP 7 - 1973
ROSS M. LILLARD, JR.
Clerk

IN THE COURT OF CRIMINAL APPEALS,
STATE OF OKLAHOMA

LeROY LUNA, Appellant,

vs.

THE STATE OF OKLAHOMA, Appellee.

No. PC-73-73

— OPINION —

BLISS, Presiding Judge:

This is an appeal from a denial of post conviction relief in the District Court of Hughes County, Oklahoma, Case No. 2826. Appellant, hereinafter referred to as defendant, was charged in Hughes County on August 25, 1954, with the offense of Child Abandonment. On August 27, 1954, defendant, without benefit of counsel, entered a plea of guilty to the charge and was sentenced to five (5) years imprisonment, said sentence being suspended.

After complete execution of the sentence and on March 7, 1973, the defendant filed his Application for Post-Conviction Relief alleging numerous technical defects in the 1954 proceedings and that the defendant had not been represented by counsel, had not knowingly and willingly waived preliminary hearing and had not been advised of his constitutional rights or his right to appeal.

[APPENDIX]

At the conclusion of a full evidentiary hearing, the trial court made essentially the following findings of fact and conclusions of law:

> "It is the conclusion of the Court that the defendant was properly informed of all the necessary constitutional rights at his appearance in District Court; that he effectively waived any and all rights, including any defects in procedure and entered an effective plea of guilty and was properly sentenced thereon. That for the reasons as set out herein the application should be and the same is in all things denied."

From said denial the defendant perfected this appeal.

The first issue which must be determined by this Court is one of whether the defendant is entitled to an adjudication under the Post Conviction Relief Act as to the invalidity of the 1954 judgment and sentence since the sentence has been wholly executed.

The Post Conviction Relief Act, 22 O.S. 1971, §§ 1080-1088, contains no requirement that an applicant be in custody, under any form of restraint or supervision, or that the sentence be unsatisfied in any respect; § 1080 providing as follows:

> "Any person who has been convicted of, or sentenced for, a crime and who claims:
> "(a) that the conviction or the sentence was in violation of the Constitution of the United States or the Constitution or laws of this state;
>
> * * * * * *
>
> "(e) * * *; or
>
> "(f) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding or remedy;

may institute a proceeding under this act * * *."

It is obvious that a person convicted of a crime who has satisfied the judgment and sentence may be subject to collateral legal consequences which are not negated by an executive pardon. For example, 21 O.S. 1971, § 506 provides that no person who has been convicted of perjury shall thereafter be received as a witness. In *Blakely* v. *Bearden*, 139 Okl. 237, 281 Pac. 952, this Court held that § 506 is a rule of evidence which remains unchanged by executive pardon. Other examples are the proof of a prior conviction to impeach a witness; the proof of "good moral character" to obtain American citizenship; and the application of the Oklahoma second and subsequent offense statutes.

The United States Supreme Court in *Sibron* v. *New York*, 392 U.S. 40, 20 L.Ed.2d 917, 88 S.Ct. 1889 (1968), has held that:

> "* * * a criminal case is moot only if it is shown that there is no possibility that any collateral legal consequences will be imposed on the basis of the challenged conviction. * * *"

The Court then went on to state that:

> "* * * it is far better to eliminte the source of a potential legal disability than to require the citizen to suffer the possibly unjustified consequences of the disability itself for an indefinite period of time before he can secure adjudication of the State's right to impose it on the basis of some past action. * * *"

Therefore, for the reasons set out above, this Court holds that the question is not moot and the defendant may properly apply for relief under the Post Conviction Relief Act even though his sentence has been wholly executed.

The defendant's first proposition in error urges that the form of the Findings of Fact and Conclusions of Law was improper. Defendant cites no authority or cases in

support of his allegation and the proposition is for that reason without merit.

The defendant's last contention is that at the time of the original judgment and sentence, the defendant was not represented by counsel, that he entered an involuntary plea of guilty and that his plea was not based on sound counsel and advice. An examination of the record reflects that, although the original judgment and sentence was silent on its face concerning defendant having been represented by counsel and advised of his rights, the minutes show the defendant had been duly informed of his constitutional rights, waived time to plead and the reading of the information and entered a plea of guilty.

The transcript of the evidentiary hearing shows that the District Judge who received the defendant's guilty plea testified that, although he did not recall the specific case, it was his standard procedure to advise each defendant of his rights, including his right to counsel, before accepting a guilty plea. The Assistant County Attorney who prosecuted the case also testified that it was his standard procedure to discuss the complaint with a defendant before a guilty plea was entered, although he could not independently recollect the instant case.

The defendant testified that after his arrest he was held in jail for two days and then taken directly before the trial judge. Defendant then testified that he could not recall being advised of his rights and that he was not allowed to say anything although he did admit entering the guilty plea.

This Court has held on numerous occasions that the minutes of a trial court will be given great weight. *Parra* v. *Page*, Okl.Cr., 430 P.2d 834. Considering the minutes, the testimony and the record as a whole, we cannot say that the trial court abused its discretion in denying the post conviction relief prayed for since there is sufficient evi-

dence in the record of the evidentiary hearing to support the trial court's findings. Therefore, the judgment and sentence is AFFIRMED.

AN APPEAL FROM A DENIAL OF POST CONVICTION RELIEF IN THE DISTRICT COURT OF HUGHES COUNTY, OKLAHOMA, HONORABLE RUDOLPH HARGRAVE, JUDGE.

Appellant, Leroy Lune, seeks reversal of the District Court's Order Denying Post Conviction Relief. The District Court's denial of post conviction relief is AFFIRMED.

DON HAMILTON,
OKLAHOMA CITY, OKLAHOMA,
Attorney for Appellant,

LARRY DERRYBERRY, ATTORNEY GENERAL,
MICHAEL CAUTHRON, ASST. ATTY. GENERAL,
DANIEL J. GAMINO, LEGAL INTERN,
Attorneys for Appellee.

OPINION BY BLISS, P. J.,
BUSSEY, J., CONCURS, and
BRETT, J., CONCURS IN PART AND DISSENTS IN PART.

APPENDIX F

BRETT, J.: Concurs in part and dissents in part.

I concur in the first part of this decision which finds that defendant is properly before this Court; and that his former conviction may be considered under post conviction remedy proceedings.

However, I must respectfully dissent to that part of this decision which finds that defendant's plea of guilty was knowingly and intelligently entered; and that defendant's

plea is supported by the trial court's minutes. The court minute entered August 27, 1954, in case number 2826, recites the following:

> "Defendant appeared in person in open court. Was duly informed of his constitutional rights. Waived time to plead; waived reading of information and entered a plea of guilty. Upon recommendation of Assistant County Attorney John R. Turner, defendant sentenced to serve 5 years in the State Penitentiary at McAlester, Oklahoma. It is the judgment and sentence of the Court that said defendant serve 5 years in the State Penitentiary, at McAlester, Oklahoma., said sentence to be suspended on good behavior."

Defendant's complaint in this proceeding is that he was not represented by counsel; and that he involuntarily entered his plea of guilty to the charge of child abandonment. As I interpret the laws the foregoing minute is not sufficient to show that defendant was properly informed of his right to have legal counsel, and that he knowingly and intelligently waived that right prior to entering his plea of guilty.

Defendant was arrested on August 24, 1954, on a Justice of the Peace warrant issued June 24, 1954. On the same date the warrant was issued, defendant's wife filed a petition for divorce. The arrest occurred when defendant returned from California to visit his children in Atwood, Oklahoma. At the time of his arrest, defendant was twenty-four years of age, a truck driver, and possessed a fifth grade education. Defendant testified that he was wearing a body-cast at the time of his arrest, because of a logging accident which occurred in California; that he had given his wife the total sum of One Thousand Dollars ($1,000.00); and that he was receiving the sum of thirty-five Dollars ($35.00) each week from his compensation allowance. On September 1, 1954, after his purported trial, defendant exe-

cuted a Waiver of Appearance in the divorce proceedings. Defendant also testified that he was not aware of the fact that he had actually been convicted of a felony, until recently.

The question presented herein is: "Does the record sufficiently show that defendant after waiving his right to counsel knowingly and intelligently entered his plea of guilty?" I believe it does not show defendant's plea to have been so entered.

The court minute which recites, "Defendant . . . was duly informed of his constitutional rights" does not presume to indicate that those rights were explained to defendant. The explanation of the constitutional rights, and especially a defendant's right to counsel in felony cases, has been the law in Oklahoma since statehood. An extensive discussion of the right to counsel can be found in this Court's decision in *Jackson* v. *State*, Okl.Cr., 316 P.2d 213 (1957). In *Jackson*, this Court quoted from *Ex parte Cornell*, 87 Okl.Cr. 2, 193 P.2d 904 (1948), as follows:

> "Under Bill of Rights (Art. 2, § 20, Okl.Const.) an accused has the right to consult with counsel and to be fully advised as to his rights and as to the consequences of his act before entering his plea to the indictment or information.
>
> "A plea of guilty should be entirely voluntary, and should be made by one competent to know all the consequences thereof, and should not be accepted until after the defendant has been fully advised by the court of his rights and the consequences of his plea."

"A waiver of the constitutional right to assistance of counsel is of no less moment to an accused who must decide whether to plead guilty than to an accused who stands trial." *Jackson* v. *State*, *supra*. "Presuming a waiver of counsel from a silent record is impermissible; the record must show, or there must be an allegation and evidence

which show, that the accused was offered counsel, but intelligently and understandingly rejected the offer." *Boykin* v. *Alabama*, 395 U.S. 238 (1969). "A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary." *Carnley* v. *Cochran*, 369 U.S. 506, 515 (1962). See also: *Johnson* v. *Zerbst*, 304 U.S. 458.

There was no specific testimony offered to show that defendant was offered legal assistance, when he entered his plea, except that the trial judge testified that it was his custom and practice to make such offer. However, that offer does not appear in the trial records; and the record of post conviction hearing in this case is not sufficient to support the state's contention that defendant knowingly and intelligently entered his plea of guilty. As I view the record presented to both the trial court and this Court, the judgment and sentence is void and should be vacated.

Therefore, I am compelled to dissent to that part of the majority decision, which finds that the plea of guilty was properly received.

CERTIFICATE OF MAILING

I hereby certify that I mailed three copies of the above and foregoing Petition for Writ of Certiorari to each of the following parties on this 6th day of December, 1973:

Larry Derryberry
Attorney General
State Capitol Building
Oklahoma City, Oklahoma 73105

Gordon Melson
District Attorney
Hughes County Courthouse
Holdenville, Oklahoma

ORIGINAL SIGNED BY
DON HAMILTON

DON HAMILTON